Supreme Court, U.S.
FILED
JAN 6 2002
CLERK

(3)

No. 02-347

IN THE

SUPREME COURT OF THE UNITED STATES

James E. Loskill,
Petitioner

v.

Barnett Banks, Inc. Severance Pay Plan, Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, NationsBank Corporation Corporate Benefits Committee, and NationsBank Benefits Appeal Committee,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION FOR WRIT OF CERTIORARI

Robert J. Winicki
(Counsel of Record)
Debbie K. Winicki
Winicki Law Firm, P.A.
4745 Sutton Park Court
Suite 401
Jacksonville, Fl. 32224
(904) 992-4997

Morey Raiskin
Lowndes Drosdick Doster
Kantor & Reed, P.A.
215 N. Eola Drive
Orlando, Fl. 32802
(407) 843-4600

Attorneys for Petitioner
James E. Loskill

5 pp

REASONS TO GRANT THE WRIT OF CERTIORARI

The Issue Presented was Properly Raised in the Eleventh Circuit.

The respondents on page 5 of their opposition fallaciously assert that petitioner, Loskill, never argued that a "violation of plan amendment procedures could create ERISA liability absent a showing of bad faith." This statement is simply untrue.

The issue presented herein was squarely set forth in Loskill's petition for rehearing and rehearing en banc in the Eleventh Circuit. Loskill's issue presented on page 8 of his rehearing petition was:

> Does the majority panel opinion directly conflict with the United States Supreme Court's holding in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) which held that "whatever level of specificity a company ultimately chooses, in an amendment procedure or otherwise, it is bound to that level" and the Supreme Court's statement in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997) that an employer "must follow the formal procedures set forth in the plan" to validly alter it?

As set forth on pages 28 and 29 of Loskill's answer brief in the Eleventh Circuit, "Loskill's position before the trial court and on appeal was and is that a purported plan amendment to the Severance Pay Plan that is not approved and adopted by the Barnett Employees Benefits Committee is

defective and void. Under the plain language of the Severance Pay Plan, it could not be amended unless the following occurred: 'The [Barnett Employee Benefits] Committee will determine that an amendment is appropriate and will determine whether the amendment may significantly alter the cost of the Plan. The Committee or its agent will draft the amendment. Each amendment must be approved by a majority of the Committee members then in office.' Not one of these three separate requirements was met with respect to Resolution G [the release amendment]."

The trial court made an additional finding of bad faith on a *sua sponte* basis because Loskill's summary judgment argument on the invalidity of the amendment was not premised upon any finding of bad faith. Respondents' initial brief on page 28 in the Eleventh Circuit recognized Loskill's position and stated: "Loskill had never even argued – in his complaint, summary judgment motions, or any paper filed with the Court – that Barnett had acted in bad faith in adopting the Release Amendment. That subject was never addressed in the parties' papers." Respondents' reply brief on page 10 in the Eleventh Circuit asserted, "the District Court's *sua sponte* finding of bad faith – an issue which neither party briefed – was incorrect as a matter of fact and law." Later, in respondents' Eleventh Circuit reply brief on page 14, they state: "Loskill's only response on the bad faith issue is his claim that: '[t]he violations of the procedural requirements of the Barnett Severance Plan were so severe that Judge Nimmons' also made a *sua sponte* finding of bad faith.'"

Loskill's position in this litigation from the outset has been that "a purported plan amendment to the Severance Pay Plan that is not approved and adopted by the Barnett Employees Benefits Committee is defective and void." Thus, the issue presented in this petition was properly raised below.

The Eleventh Circuit is Alone in its Holding that "an amendment adopted in violation of the procedures set forth in a plan is invalid only upon a further showing of bad faith, active concealment, or detrimental reliance."

The respondents erroneously assert in sections II and III of their opposition that there is no conflict with this Court's opinions or any of the opinions of the United States Courts of Appeals, and on page 19 that the Eleventh Circuit is in "complete accord with the unanimous position of the lower courts." Even a cursory reading of the quotes from this Court's opinions in *Curtiss-Wright* and *Inter-Modal*, which were set forth in the issue presented in this petition, establish the conflict.

Furthermore, the relevant distinction concerning application of federal common law equitable principles found in the case law from the United States Courts of Appeals is all premised upon the situation where there is no plan procedure for amendment or there is a disclosure violation, and not where the amendment is purportedly adopted in the first place in violation of explicit plan procedures as expressly required by section 402(b)(3) of ERISA. Judge Roney in his dissent in *Loskill*, pointed to this distinction before he concluded: "As far as we have been able to determine, this is the first circuit court case that has held that an amendment adopted in violation of the procedures set forth in a plan is invalid only upon a further showing of bad faith, active concealment, or detrimental reliance." *Loskill*, 289 F.3d 734, 740 (11th Cir. 2002) (App. A at 12) (Roney, J. dissenting).

Respondents' attempt to distinguish the United States Courts of Appeals cases cited by Loskill do not succeed as the cases themselves discuss in separate sections the different situation of a purported amendment not adopted in

accordance with explicit plan procedures from situations where there is no plan procedure or where there is a disclosure violation. A prime example is the Third Circuit's opinion in *Ackerman v. Waranco, Inc.*, 55 F.3d 117, 122 (3rd Cir. 1995) where the issue of whether the proper entity approved the new plan provision was discussed and remanded entirely separate from the discussion and remand of the disclosure issue. The quote from *Ackerman* relied upon by respondents on page 17 of their opposition is found only in the section of the *Ackerman* opinion dealing with the disclosure issue. *Id.* at 124. *See also Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 568-69 (7th Cir. 1995), *affirming*, 850 F.Supp. 1367, 1380 (C.D. Ill. 1994) (distinguishing *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991)).

Respectfully submitted,

Robert J. Winicki
(Counsel of Record)
Debbie K. Winicki
Winicki Law Firm, P.A.
4745 Sutton Park Court
Suite 401
Jacksonville, Fl. 32224
(904) 992-4997

Morey Raiskin
Lowndes Drosdick Doster
Kantor & Reed, P.A.
215 N. Eola Drive
Orlando, Fl. 32802
(407) 843-4600

Attorneys for Petitioner
James E. Loskill